4-23-1976

Earl Raymond Cantrell v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-1132

APPELLANT'S BRIEF

552 SW2d 660

SUPREME COURT OF KENTUCKY

FILE NO. 75-1132

EARL RAYMOND CANTRELL — APPELLANT

VS. — APPEAL FROM JOHNSON CIRCUIT COURT
HON. W. D. SPARKS, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. William B. Hazelrigg, Judge, Johnson Circuit Court, Johnson County Courthouse, Paintsville, Kentucky 41204; Hon. Eugene C. Rice, Commonwealth Attorney, 24th Judicial District, Paintsville, Kentucky 41204; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 23rd day of April, 1976.

J. Vincent Aprile II

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* * * * * * * * * * * *

MAY IT PLEASE THE COURT:

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STATEMENT OF THE CASE

On January 23, 1974, appellant was indicted in the Johnson Circuit Court for the offense of willful murder in violation of KRS 435.010 (Transcript of Record, hereinafter designated T.R., p. 2). According to the indictment, appellant on or about December 10, 1973 "did willfully murder Patsy Cantrell, his wife" (T.R., p. 2).

Contrary to his plea, appellant on April 19, 1974 was convicted of voluntary manslaughter and sentenced to imprisonment for twenty-one years (T.R., p. 15; Transcript of Evidence, hereinafter designated T.E., p. 244).

Appellant filed his motion for a new trial on April 21, 1974 (T.R., pp. 17-19). That motion was denied on April 22, 1974 (T.R., p. 20). Judgment was entered in appellant's case on May 1, 1974 (T.R., pp. 23-25).

Although a notice of appeal was filed on April 25, 1974, it appears from the record that the direct appeal from appellant's conviction of voluntary manslaughter was never perfected (T.R., p. 21).

On August 14, 1975, the Johnson Circuit Court granted appellant's motion pursuant to RCr 11.42 and ordered that appellant be granted a "belated appeal" of his conviction under Indictment No. 5915 (T.R., p. 29). Appellant filed a notice of appeal on August 20, 1975 (T.R., p. 30).

STATEMENT OF THE FACTS

In an attempt to prove the offense alleged in the indictment, the prosecution called numerous witnesses, including relatives and neighbors of the deceased, to establish the chain of events from Sunday, December 9, 1973, the last day appellant's wife was seen alive, until Tuesday, January 8, 1974, the day her body was discovered buried near an old shack.

The first prosecution witness, Detective Music of the Kentucky State Police, testified that in December of 1973 he investigated the disappearance of Patsy Cantrell, appellant's wife (T.E., pp. 10-11). In the course of his inquiry, Detective Music questioned appellant concerning the facts surrounding Mrs. Cantrell's disappearance to acquire "details for a missing person report" (T.E., pp. 12-13). According to the witness, appellant said that he and his wife had "been over to Emma King's on Sunday" and had come home that afternoon (T.E., p. 13). Appellant allegedly told Detective Music that on Monday he and his wife had "laid around the house" and then had "come into town" together. Appellant explained to the detective that he and his wife had gone to bed around eight or nine o'clock on Monday night (T.E., p. 13). When appellant awoke on Tuesday morning, he discovered that his wife was gone.

Detective Music testified that, according to his investigation, appellant had called the Paintsville City Police at four-thirty on Tuesday afternoon to report his wife's disappearance (T.E., p. 15).

At approximately one p.m. on Tuesday, January 8, 1974, Detective Music, in response to a phone call, went to an area known as Andy Lick which is approximately six miles from appellant's home at Red Bush (T.E., pp. 20, 21, 50). The detective testified that "approximately a mile up the hollow" at Andy Lick Creek "there was a body, a human being," with the toes of the left foot and the right hand "sticking up out of the ground" (T.E., pp. 23-24).

Detective Music related that the body had been buried "[u]nderneath the back edge" of "a little shed" (T.E., p. 26). Since the body was buried directly under the eaves of the shed, the rain fell down on the grave as it dripped

off the building (T.E., p. 26). The dripping rain caused the dirt to be off the right hand and right toe of the body (T.E., p. 70).

The body was subsequently identified as the remains of Patsy Cantrell, appellant's wife (T.E., p. 34).

After the body was discovered, Detective Music arrested appellant on the charge of murder and placed him in jail (T.E., p. 24). On the following morning, January 9, 1974, Detective Music interrogated appellant about the death of Mrs. Cantrell (T.E., p. 37). In this interview appellant allegedly altered his original account of the events leading up to his wife's disappearance (T.E., p. 39). According to the detective, appellant said that on Monday morning when the alarm went off he was unable to find his wife (T.E., p. 39). Appellant "got the kids ready for school." After the children left, appellant and his younger daughter, Angie, went to the unemployment office in Prestonsburg where appellant signed up for unemployment compensation (T.E., p. 40). When appellant returned to his home at one-thirty that Monday afternoon, he found his wife there (T.E., p. 41). At one-thirty or two o'clock that afternoon Johnny Gamble drove up to the Cantrell house in his truck (T.E., p. 41). Appellant had worked for Mr. Gamble, helping him with his tobacco (T.E., p. 41). Appellant had previously told Mr. Gamble that he wanted to go with him when Mr. Gamble "went to Maysville to sell his tobacco at the market" (T.E., p. 41). When Mr. Gamble "tooted his horn," appellant came from his house "down the hollow" to the road. Mr. Gamble asked appellant to go with him that evening, but appellant refused (T.E., pp. 41-42). Appellant allegedly told Mr. Gamble that when he returned from Prestonsburg that afternoon he had found on his door a note from his wife which explained that Mrs. Cantrell "had

gone to see her mother" who was sick (T.E., p. 42). According to Detective Music, appellant informed Mr. Gamble that he couldn't go with him because he would have "to stay with the kids and get those ready for school the next morning" while his wife was "taking care of her mother" (T.E., p. 42).

However, Detective Music conceded that appellant had told him during the jail interview that these comments to Mr. Gamble were not true and were made only because he did not want to go with Mr. Gamble (T.E., p. 42). Throughout the conversation with Mr. Gamble, appellant's wife was in the house. There simply never was a note on the door (T.E., p. 42).

Edgar Vanhoose, the Johnson County Coroner, testified that Mrs. Cantrell's body, when found, was nude (T.E., p. 72). A pair of blue slacks were lying over the lower extremities of the body and a fastened bra was lying beneath the breast (T.E., p. 73). There was a sweater over the head of the body (T.E., p. 73).

Dr. Ann Hooper, a pathologist who was the local regional medical examiner, testified that at eight p.m. on January 8, 1974 she conducted an autopsy on Patsy Lorraine Cantrell, the alleged victim (T.E., pp. 74-75). The doctor's external examination of the body revealed no evidence of marks or wounds (T.E., pp. 75-76).

According to Dr. Hooper, "[t]he only thing which was a little unusual were a number of tiny hemorrhages in the larynx, which is where you find the adams apple, and in the surrounding tissue" (T.E., p. 76). Dr. Hooper emphasized that these hemorrhages "were internal, not on the outside" (T.E., p. 76).

The pathologist testified that she "found no evidence of any disease which could have contributed" to Mrs. Cantrell's death (T.E., p. 78).

Doctor Hooper admitted on direct examination that she was unable to arrive at a determination as to the cause of Mrs. Cantrell's death (T.E., p. 82). However, Dr. Hooper then attempted to "eliminate with a high degree of probability" certain specific causes of death, such as heart attack, poison, and natural disease (T.E., p. 83).

During a general discussion of the physical and chemical changes that occur in a body after death, the pathologist commented:

> [T]he first thing that happens when a person dies is that the blood starts to settle in the parts that are the lowest. This is a matter of strictly of gravity. The changes which are caused by this are called livormortis. If you move the body immediately after death, this will settle to whatever is lowest at the moment. After several hours after death, this would get what we call fixed; and then no matter how much you move a body the livormortis will remain in the same position (T.E., pp. 76-77).

The pathologist noted that "[t]here was no livormortis in any portion of the body" of Patsy Cantrell (T.E., p. 77). In explanation of this fact, Dr. Hooper offered this explanation:

> Livormortis is settling of the blood after death into the lower portions of the body, the part that's lying. If it's on the back, you see it on the buttocks and the shoulders primarily. If a body is moved shortly after death the livormortis will change from place to place as it's moved. Once the body has been in a position for a number of hours after death this becomes fixed and further moving of the body will not change the livormortis. In the case of the body of Patsy Cantrell, there was no livormortis in any portion of the body. My interpretation of this finding was that the body was moved and placed in many positions in the period after death before livormortis could

> become fixed; but the body was not left in any position long enough for the livormortis to set in and become fixed (T.E., pp. 77-78).

Emma King, a prosecution witness, testified that appellant had lived with her and her husband for the two years preceding his marriage (T.E., p. 87). The witness explained that she was acquainted with appellant's wife, Patsy (T.E., p. 87). According to Mrs. King, appellant and his wife had visited her "a few times."

Mrs. King noted that she had last seen Mrs. Cantrell on Sunday, December 9, 1973 when appellant, his wife, and his children had dinner at her home (T.E., p. 88). On that evening, according to Mrs. King, appellant told her that she should "watch" her daughter, Shirley, because "somebody" had "bothered" his ten-year-old daughter, Judy, "out at the gap" (T.E., p. 90).

During that conversation, Mrs. Cantrell supposedly interjected an account of an incident which occurred while appellant and his daughter, Judy, were "on the hill fencing" (T.E., p. 91). Mrs. King offered this paraphrase of the ensuing conversation between appellant and his wife:

> Well, she said, telling about him and Judy being up on the hill fencing. So he started _____, and said Judy took the wire and run off the hill with it, and said that they's another one bothered her there. And she said, "Well, who was it, Earl?" And Earl was a drinking when he was a talking, and he said, "I don't know who it was. I didn't see nobody." She said, "There wasn't but one man up there and it was you." Now that was exactly what she said (T.E., p. 92).

Linda Karen Cantrell, after noting that she did not personally know appellant, testified that at "[a]bout twenty minutes till two" on the morning of January 4, 1974 the following incident occurred:

> I was coming home from work one morning, and as I came around the curve above where he [the appellant] lives there was a man stepped from the lower part of the, you know, out of the bushes or out of the woods, kind of up on the road (T.E., p. 98).

Linda Cantrell explained that the man was carrying a "large" and "long" bundle which "must have been heavy" because the man "was kind of stooped" as if he had "to hold it onto his back" (T.E., p. 98). The witness added that the bundle was "[j]ust kind of thrown across his shoulder" and "laying down his back." The man was apparently holding the bundle "from the top" (T.E., p. 98).

Another prosecution witness, Cozy Salyers, testified that at approximately three o'clock on a Thursday or Friday morning in early January, 1974 while he was driving home from work he spotted in the Red Bush area two ponies (T.E., p. 103). He first thought the ponies were running "loose," but as he slowed down he could see that "there was someone on the other pony and there was something laying across the pony that was leading" (T.E., p. 103). The witness could not say what was lying on the riderless pony (T.E., p. 103). Mr. Salyers added that he was unable to identify the person riding the other pony (T.E.,p. 104).

Johnny Gamble, testifying for the prosecution, recalled that in December of 1973, appellant, while working for him tying tobacco, had indicated that he would go with Mr. Gamble to Maysville when it was time to take the tobacco there to be sold (T.E., p. 113). On Monday, December 10, 1973, Mr. Gamble stopped by appellant's home to see if he still wanted to go to Maysville (T.E., pp. 114-115). At that time appellant declined the invitation. According to Mr. Gamble, appellant said: "I can't go. My wife went to her mother's yesterday" and "I've got to stay here and put the kid on the bus in the morning" (T.E., p. 114).

Ricky Cantrell, appellant's eight-year-old son, was called as a prosecution witness (T.E., p. 121). The boy testified that on the last day he saw his mother his family had eaten at Emma King's home (T.E., p. 123). After leaving the King's residence, the Cantrell family returned to their home and Ricky Cantrell went to bed (T.E., pp. 123, 124).

After eliciting that information, the prosecutor proffered numerous questions to the eight-year-old witness, but the boy either said nothing in response or answered negatively (T.E., pp. 123-127). Apparently frustrated by the inability of the witness to relate any information pertinent to the case, the prosecutor asked the witness if he remembered making certain statements to the prosecutor at an earlier time (T.E., p. 127). As a result of this questioning procedure, the witness indicated that he remembered telling the prosecutor that through the window he had seen his father outside the house carrying his mother across the road and into the woods (T.E., p. 129).

Appellant testified that he last saw his wife alive on Sunday, December 9, 1973 (T.E., p. 135). About ten o'clock that Sunday morning, appellant, his wife, and his children went to Emma King's home and stayed there until "[j]ust after dinner" (T.E., p. 135). According to appellant, he and his wife had not had any difficulty or disagreement that day (T.E., p. 135).

Appellant and his family left the King home between three and four in the afternoon and went "straight on home" (T.E., p. 136). Upon arriving at the house, appellant saw "a piece of paper on the door" (T.E., p. 136). Appellant's wife "went up to the door" first, "unlocked the door and took the paper off." When appellant asked her what the note was, she replied that it was nothing (T.E., p. 136).

Appellant recalled that the children went to bed first that Sunday night. When appellant went to bed around seven o'clock that night, his wife was up and in the kitchen (T.E., pp. 136-137). Appellant explained that both he and his wife had been drinking that day (T.E., p. 137).

When appellant awoke at approximately five-thirty the next morning, he looked about the house for his wife, but was unable to find her (T.E., p. 138). With his wife nowhere to be found, appellant undertook the chore of helping his children ready themselves for school (T.E., p. 138).

After the children left, appellant and his "little boy" went to Prestonsburg where appellant signed up for unemployment and purchased a pair of shoes for his son (T.E., p. 138).

Appellant noted that he and his wife had argued approximately five weeks before she disappeared. During that disagreement, appellant's wife had remarked that if she left she would take the children. When appellant told her she would not take the children, she said, "Well, I'll go, but I'll come back with the law (T.E., p. 138). Appellant explained that when his wife was absent that Monday morning in December, he "figured that she had went to get the law" (T.E., p. 139).

Appellant stayed home that Monday night and on Tuesday morning he rose early and "got the kids ready for school" (T.E., p. 139). That morning appellant looked through his wife's clothing and learned that she had taken "all of her good ones" (T.E., p. 139). Later that day appellant made inquiries concerning his wife's whereabouts of various people including his wife's parents and various neighbors (T.E., p. 140). No one, however, had seen appellant's wife. At that point appellant called the city police

in Paintsville and told them of his wife's disappearance (T.E., p. 141).

Appellant explained on the witness stand that, after his wife's disappearance, he "took care of the kids" and "tried to find out" where his wife was (T.E., p. 141).

Appellant emphatically stated on the witness stand that he did not murder his wife or inflict any bodily harm on her (T.E., pp. 134-135).

During his initial cross-examination of appellant, the prosecutor, over defense objection, asked numerous questions which implied that appellant and his wife had seriously argued about whether appellant had sexually abused his ten-year-old daughter, Judy (T.E., pp. 170-173, 186).

After the defense rested its case on April 18, 1974, the trial judge adjourned court for the day (T.E., pp. 188, 189). When the court reconvened at one p.m. the following day, the prosecutor requested and obtained a "delay" in the proceedings (T.E., p. 189). Shortly thereafter in an in chambers hearing the prosecution moved to reopen its case in chief to present "the testimony of a witness," Billy Joe Rose, whom the prosecution had not learned about until after the defense rested (T.E., p. 190). According to the prosecutor, this witness would testify that "he saw the body of Patsy Cantrell in the bedroom of the Cantrell home on Sunday evening, December 9, 1973. . .and. . .determined she was dead" (T.E., p. 190).

Over defense objection, the trial judge sustained the prosecution's motion to reopen its case in chief to introduce the testimony of Billy Joe Rose (T.E., p. 192). After the ruling, defense counsel objected, emphasizing the "injustice" to appellant which would result (T.E., p. 192).

The witness, Billy Joe Edward Rose, Jr., testified that he was a seventeen-year-old sophomore at the Johnson Central High School and the grandson of Emma King (T.E., p. 193). Billy Rose recalled that on Sunday, December 9, 1973, he and appellant had hunted together while appellant's family visited at Emma King's home (T.E., p. 193). According to the witness, appellant and his family left the King residence at "about four o'clock" in the afternoon (T.E., p. 194). Billy Rose remained at his grandmother's home and completed his chores before he went to appellant's house that Sunday night (T.E., p. 194). By the time that Billy Rose allegedly arrived at appellant's home it was dark. The witness said that he was "outside with the children" when he heard "[a] bunch of screams" (T.E., p. 196). In response to the screams, the witness ran into house and saw appellant's wife lying on the bedroom floor (T.E., p. 196). Billy Rose testified that appellant was sitting in a chair with head down toward the floor (T.E., pp. 196-197). The witness said nothing to appellant, but went over and felt Patsy Cantrell's pulse "to see if she was alive or dead" (T.E., p. 197). Billy Rose decided that Mrs. Cantrell "wasn't breathing at all" and "was dead" (T.E., pp. 197-198). The witness then left the Cantrell residence and returned to his grandmother's house, however, he did not tell his grandmother what he had seen at Cantrell's home (T.E., p. 198).

After the prosecution had reopened its case, the defense called Judy Cantrell, appellant's ten-year-old daughter (T.E., pp. 206, 207, 208). She testified that on the Sunday night in question when she and her family returned from Emma King's house no one else was at her home and no one else came over that night (T.E., p. 208). According to Miss Cantrell, Billy Rose, Jr., was not at the Cantrell home that night (T.E., p. 209).

Appellant took the stand as a rebuttal witness and testified that Billy Joe Rose, Jr., was not at appellant's home on the Sunday in question (T.E., p. 213).

The Commonwealth then called Ricky Cantrell, appellant's son, who said that Billy Joe Rose was at the Cantrell house "that Sunday night" and that Billy Joe Rose played "hide and seek" with him and his sister "outside the house" (T.E., p. 214).

ARGUMENTS

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING TRIAL COUNSEL'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL.

At the conclusion of the presentation of the Commonwealth's case in chief, trial defense counsel moved the court below for a directed verdict of acquittal on the following grounds:

> first, there is no evidence of record establishing any foul play against the deceased in Johnson County or in any place else; that the autopsy report provided by the pathologist states that she was unable to determine the cause of death whether natural or unnatural. There is no competent evidence whatsoever of any foul play; second, if there was any foul play, there is no substantial evidence or sufficient for a conviction or sufficient to move the jury to establish that this defendant had anything to do with it or that he committed any act against the deceased in any manner at any time or place. . .(T.E., p. 133).

The trial judge overruled that motion (T.E., p. 134). Appellant's counsel renewed this motion at the conclusion of the defense evidence, but was again overruled (T.E., p. 188). This issue was also one of the grounds

raised in appellant's motion for a new trial which was also overruled by the trial court (T.R., pp. 17-19, 20).

In the instant case, the deceased's body was discovered buried beside an old shed in a desolate area (T.E., pp. 22, 64-65, 69-70).

Dr. Ann Hooper, the pathologist, explained on direct examination that, even after conducting an autopsy on the deceased, she was unable to arrive at a determination as to the cause of death (T.E., pp. 82, 84, 85-86). During her examination of the body, the pathologist found no bruises, no cuts, no abrasions, and no broken bones (T.E., pp. 75-76).

According to Dr. Hooper, "[t]he only thing which was a little unusual were a number of tiny hemorrhages in the larynx, which is where you find the adams apple, and in the surrounding tissue" (T.E., p. 76). Dr. Hooper emphasized that these hemorrhages "were internal, not on the outside" (T.E., p. 76).

The pathologist testified that she "found no evidence of any disease which could have contributed" to Mrs. Cantrell's death (T.E., p. 78). Following this procedure, Dr. Hooper attempted to "eliminate with a high degree of probability" certain specific causes of death, such as poison, skull fracture, heart attack, stroke or natural disease (T.E., pp. 82-83).

In an effort to demonstrate the degree of reliability inherent in her "process of elimination" diagnosis, Dr. Hooper stated, "I can eliminate with a high degree of probability, let's say ninety-nine percent probability, that she didn't die of a heart attack, that she didn't have a stroke" (T.E., p. 83). The doctor added that "it is extremely rare that a person dies of natural disease and in doing an autopsy you cannot find any anatomic cause of death" (T.E., p. 83).

Dr. Hooper did admit that such a situation "happens," but she speculated that it would occur "much less even than one percent, maybe one in a thousand" (T.E., p. 83).

Despite the absence of any probative evidence to support her opinion, Dr. Hooper voiced the following speculation:

> In death, due to suffocation, the small hemorrhages which are found inside the throat and the larnyx or voice box are quite characteristic. When suffocation is done with a soft object, such as a pillow, it will leave no bruises or obvious marks; so, I felt that this death. . .well, I couldn't say that it did happen. It was certainly compatible with it, suffocation with something such as a pillow (T.E., p. 84).

Parenthetically, it should be noted that appellant's counsel objected to Dr. Hooper's testimony on this point, but his objection was overruled (T.E., p. 84).

The pathologist in the case at bar could point to no physical evidence which unequivocally indicated death by suffocation. In fact, Dr. Hooper time and time again conceded that she was unable to determine the cause of Patsy Cantrell's death (T.E., pp. 82, 84, 85-86). Ultimately, the pathologist's conjecture that the hemorrhages in the larnyx were "certainly compatible with" suffocation with an object such as a pillow was premised primarily on her failure to discover evidence of the cause of death.

In the instant case the pathologist herself said that she could not say that appellant's wife died as a result of suffocation (T.E., p. 84). Instead she merely speculated that "the small hemorrhages" on the larnyx were "compatible" with "suffocation" by an object "such as a pillow" (T.E., p. 84). By her own admission, her testimony was speculative, devoid of any actual probative value.

Expert opinion, to be received in evidence, must be reasonable and not nebulous or speculative. 2 Jones on Evidence 6th Ed. §14:19, citing United States v. American Tobacco Co., 39 F. Supp. 957 (E.D. Ky. 1941). The opinion is no stronger than the facts which support it and the explanation of its basis. Jones on Evidence, supra. An expert witness must base his opinion on probability and not on mere possibility. Kujawa v. Baltimore Transit Co., 224 Md. 195, 167 A.2d 96, 89 ALR 2d 1166 (1961).

For medical opinion testimony to have any probative value, it must at least advise the jury that the inference drawn by the doctor is more probably correct than incorrect. If the probabilities are in balance, the matter is left to speculation. Speculation filtered through a jury is still speculation. Crawford v. Senfert, 236 Or. 369, 388 P.2d 456, 2 ALR 3d 354 (1964).

The established rule is that the cause of death may be proved only by medical testimony, except where the facts proved are such that any layman of average intelligence would know from his own knowledge and experience that the injuries described are sufficient to produce death. White v. Commonwealth, Ky., 360 S.W.2d 198, 201 (1962). In the case at bar cause of death could only be established through medical testimony since the body was devoid of any obvious injuries or wounds.

Since the medical testimony of Dr. Hooper was admittedly speculative, the prosecution failed to establish with probative medical evidence the cause of Mrs. Cantrell's death. See White v. Commonwealth, supra, at 201.

Under the evidence presented, the prosecution failed to establish the corpus delicti of a homicide.

Corpus delicti means the body of the crime and in homicide cases proof of the corpus delicti requires a showing of (1) a death and (2) that the death resulted from the criminal agency of another. Dolan v. Commonwealth, Ky., 468 S.W.2d 277 (1971); see Peace v. Commonwealth, Ky., 489 S.W.2d 519 (1972); Thompson v. Commonwealth, Ky., 479 S.W. 2d 583 (1972).

In Denham v. Commonwealth, 239 Ky. 771, 40 S.W.2d 384 (1931), this Court said:

> Circumstantial evidence which is as consistent with the absence of a crime as with the perpetration of the crime is insufficient to prove corpus delicti. Id., at S.W.2d 386. See Warnell v. Commonwealth, Ky., 246 S.W.2d 144 (1952).

Although the corpus delicti may be shown by circumstantial evidence, "the circumstances must be more consistent with guilt than with innocence." Clouser v. Commonwealth, Ky., 285 S.W.2d 146 (1955). In the case at bar, the evidence failed to show that the deceased's death resulted from the criminal agency of another. There appears nothing to support the Commonwealth's apparent theory that appellant's wife died of suffocation save suspicion, conjecture and speculation. It is clear and obvious that a jury may not be permitted to base a verdict of conviction on such judicially unacceptable underpinnings. Adkins v. Commonwealth, 313 Ky. 110, 230 S.W.2d 453 (1950).

Billy Rose, Jr., testified that on Sunday evening, December 9, 1973, while playing outside appellant's house, he heard "[a] bunch of screams" which caused him to rush into the house where he discovered Patsy Cantrell lying dead on the bedroom floor and appellant, with eyes downcast, seated in a nearby chair (T.E., pp. 194-198). Significantly, this

evidence viewed in the light most favorable to the prosecution fails to establish the means by which Patsy Cantrell met her death.

Billy Rose, Jr., was not a witness to Mrs. Cantrell's death; he was only a witness to the fact that he had found her dead on December 9, 1973. His knowledge is in no wise probative on the question of the cause of Mrs. Cantrell's death.

Even the highly questionable testimony of appellant's eight-year-old son, Ricky Cantrell, is insufficient to establish the corpus delicti of a homicide. The boy's testimony only indicated that he awoke Sunday night, presumably December 9, 1973, peered out the window, and observed his father outside the house carrying his mother across the road and into the woods (T.E., pp. 124, 127, 128). Of course, nothing in Ricky Cantrell's testimony is probative on the issue of the cause of his mother's death. Ricky Cantrell did not and could not testify that his mother was dead when she was in appellant's arms. Furthermore, even if Mrs. Cantrell was already dead when appellant was allegedly carrying her that Sunday night, that fact in no way establishes the cause of her death.

In this jurisdiction "the cause of death cannot be presumed to have been through a criminal agency." Bartley v. Commonwealth, 300 Ky. 152, 188 S.W.2d 102, 104 (1945). Consequently, the prosecution must prove the cause of death with competent, probative evidence. In a homicide prosecution, "inferences may not be substituted for facts." Warnell v. Commonwealth, Ky., 246 S.W.2d 144, 147 (1952).

In the case at bar the evidence of record establishes that the deceased's body was concealed by burial in a shallow grave near an abandoned shed. While the concealment of the body is clearly established by the evidence, there is

no direct evidence that appellant was the person who buried the deceased in that makeshift grave. Nevertheless, the fact that the body was concealed, regardless of the identity of the culprit, would not establish that the deceased died as a result of the criminal agency of another.

It is true that the concealment or attempted destruction of the body of a person murdered is regarded as an incriminating circumstance, and will be given probative force in connection with other facts. See Annotation, 2 ALR 1227 (1919) and subsequent cases as disclosed in the Later Case Service. A review of those cases, however, will disclose that with few exceptions the corpus delicti was established by other evidence and the ultimate issue reduced itself to the identity of the accused as the criminal agency.

In analyzing the probative value of the purported dispute between appellant and his wife concerning appellant's alleged improper sexual advantages toward their ten-year-old daughter, it must be remembered that evidence of such disagreements, even if competent to establish motive or malice or intent, are not admissible or competent to establish proof of the corpus delicti. See Decker v. Commonwealth, 278 Ky. 145, 128 S.W.2d 600, 602 (1939); 40 C.J.S. Homicide §201, p. 1102.

Again it is obvious from a perusal of the trial transcript that the prosecution in the case at bar failed to prove the corpus delicti of a homicide.

Appellant submits that the evidence of record is as consistent with innocence as with guilt. While a conviction in this Commonwealth may be had on circumstantial evidence, no defendant may be convicted on evidence if it is as consistent with innocence as with guilt. Mere suspicion is not enough. Fugate v. Commonwealth, Ky., 445 S.W.2d 685

(1969); Thompson v. Commonwealth, Ky., 479 S.W.2d 583 (1972); and Pruitt v. Commonwealth, Ky., 490 S.W.2d 486 (1972).

In the case at bar the prosecution failed to establish that appellant was connected with the infliction of any injury which caused the deceased's death. See Howard v. Commonwealth, 305 Ky. 258, 203 S.W.2d 27 (1947).

Significantly, Billy Rose, Jr., testified that when he entered the Cantrell house, after hearing a "bunch of screams," he saw Patsy Cantrell already lying on the bedroom floor dead (T.E., p. 196). Although Billy Rose said appellant was there in the room with the deceased, he apparently observed nothing which indicated how Patsy Cantrell met her demise.

In a similar view, Ricky Cantrell's testimony related only that he viewed his mother, either lifeless or unconscious, being carried by appellant (T.E., p. 128). Here again Ricky Cantrell, the prosecution witness, provides no evidence which connects appellant with an act that appears capable of killing Mrs. Cantrell.

The prosecution's theory that appellant killed his wife to prevent her from telling the police about his sexual abuse of their daughter could, if adequately proved, constitute a motive for the alleged crime. However, proof of motive would not be sufficient to enable the trial judge to submit the case to the jury for resolution.

It must be remembered that neither motive alone nor motive plus opportunity (or presence at the scene) is enough to justify a conviction of homicide. Marcum v. Commonwealth, Ky., 496 S.W.2d 346, 349 (1973). See, for example, Holman v. Commonwealth, 406 S.W.2d 728 (1966); and Hollin v. Commonwealth, Ky., 307 S.W.2d 910 (1957).

One final point should be noted. The evidence of record does not establish that appellant was responsible for the concealment of his wife's body in the shallow grave. But, assuming arguendo that the record proved that appellant concealed his wife's corpse, that fact would not be sufficient to sustain this conviction.

An inference of guilt may be drawn from an attempt to conceal the death of a person by hiding or destroying his remains, the basis of this rule being that a guilty conscience influences such conduct. The inference, however, is one of fact and not one of law. If the circumstances under which one is found in possession of the body of a murdered man make the inference that he was an accessory after the fact as reasonable as that he was a principal, he must be given the benefit of the conclusion that will mitigate his guilt. 40 Am Jur 2d Homicide §261, citing People v. Galbo, 218 NY 283, 112 N.E. 1041, 2 ALR 1220 (1916). With the evidence in the instant case in such an ambiguous posture, it is obviously not legally permissible to draw the inference that appellant killed his wife from the mere fact that he may have concealed her body after her death. At the most the inference would indicate only guilt after the fact -- such as accessory after the fact.

It is an established principle of law that "where the testimony on behalf of the Commonwealth fails to incriminate the accused, or is wholly insufficient to show guilt," a directed verdict of acquittal should be given. Bradley v. Commonwealth, Ky., 465 S.W.2d 266, 267 (1971); see Moore v. Commonwealth, Ky., 446 S.W.2d 271 (1969); Carmen v. Commonwealth, Ky., 490 S.W.2d 744 (1973).

Since the evidence of the record was insufficient to establish the corpus delicti of any form of homicide the

court below erred by failing to sustain trial defense counsel's timely motion for a directed verdict of acquittal. For the reasons delineated above, this Court should reverse appellant's conviction.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY RULING, OVER DEFENSE OBJECTION, THAT APPELLANT'S EIGHT-YEAR-OLD SON WAS COMPETENT TO TESTIFY.

During the initial presentation of the Commonwealth's case, the prosecution called appellant's eight-year-old son, Ricky Cantrell (T.E., p. 121). Before the prosecutor commenced his examination of the witness, the trial judge and the boy engaged in the following colloquy:

JUDGE: Is your name Ricky Cantrell?

A. Yes.

JUDGE: How old are you?

A. Eight.

JUDGE: Eight years old. What grade are you in?

A. First.

JUDGE: First grade. Where do you go to school?

A. W. R. Castle.

JUDGE: Where?

A. W. R. Castle.

JUDGE: Alright, and who is your teacher?

A. Mrs. VanHoose.

JUDGE: Ricky, I believe you're going to have to hold your gum. Will you leave it out on a piece of paper till we get through. Do you mind that, and then you can get your gum back after you're finished. (Mr. Hazelrigg gave him paper to hold the gum.)

JUDGE: Now, go ahead and. . .do you go to school about every day?

A. Yea.

JUDGE: Do you go to church and Sunday School?

A. Yes.

JUDGE: You understand now that you are about to take an oath to tell the truth, the whole truth. You know what the oath is, when you swear before God to tell the truth, the whole truth. You know what that is, don't you? You realize what could happen if you don't tell the truth?

A. (Nod, indicating yes.)

JUDGE: All right, now, I'm going to ask you to hold up your hand. Do you solemnly swear or affirm that the testimony you're about to give will be the truth and the whole truth, so help you God?

A. (Nod, indicating yes.)

JUDGE: You may be seated there now. Just be seated right there in that big chair and pull the microphone down where you can talk into it (T.E., pp. 121-122).

In the course of direct examination, the prosecutor ascertained that the witness remembered that "back in December," on the last day that he saw his mother, he had eaten dinner at Emma King's home (T.E., p. 123). The witness also recalled that after eating at the King's house, he and apparently his family returned to their home (T.E., p. 123).

At that juncture of the examination, the prosecutor asked:

> After you got back home did anything happen that night that you remember? Do you remember anything happening that night (T.E., p. 123)?

In response, the witness nodded, indicating no (T.E., p. 124).

Ricky Cantrell did remember going to bed that Sunday night, after he returned home from Emma King's house (T.E., p. 124). However, when the prosecutor repeatedly asked the witness if he recalled anything that caused him to wake up that night, the witness remained mute (T.E., p. 124). Finally Ricky Cantrell nodded affirmatively that he did wake up that Sunday night (T.E., p. 124). At that point the following exchange occurred between the prosecutor, witness, and judge:

Q.20 Do you know what woke you up? Did you hear a noise?

A. I don't know.

Q.21 After you woke up where did you go to? Did you go into the room next to or where the door goes to the outside? Did you go to where you could see out the window?

JUDGE: Tell what you did there, Ricky, that night so the jury can hear you. Just tell the truth about it.

A. (No answer.)

Q.22 Well, let me ask you this, Ricky. Did you see your Dad when you woke up?

A. (Nod, indicating no.)

Q.23 Do you remember what you told us in the back (T.E., p. 125)?

The witness did not have an opportunity to respond to this question because appellant's counsel interspersed a comment to the trial judge.

After a brief comment between the judge and appellant's counsel, the prosecutor resumed his questioning of the boy:

Q.24 Ricky, just take your time. After. . .you've told us now that you woke up. Just answer yes or no. Did you go into the other room where you could look out the window?

A. (No answer.)

Q.25 Is there any reason you don't want to answer us?

A. (No answer.)

Q.26 Did you go in the other room where you could see out the window?

A. (Nod, indicating yes.)

Q.27 I notice you're nodding your head yes. Is that what you mean? You did go in the other room?

A. (No answer.)

Q.28 You need to answer us now. If you did say yes and if not say no.

A. (No answer.)

Q.29 When you sent into the other room, did you look out the window?

A. (No answer.) (T.E., pp. 125-126).

At that point appellant's counsel made the following objection:

> I object to any further examination of the child, and object to it on the grounds of the form of questions and the suggestions made and yet the child can't answer and there is something wrong (T.E., p. 126).

Although the trial judge neglected to rule on the defense objection, he did admonish the witness "to just answer the questions and tell the truth to the jury" (T.E., p. 126).

When the prosecutor resumed his questioning, he adopted a different ploy. Instead of asking Ricky Cantrell

what he had actually observed on the Sunday night in question, the prosecutor inquired whether the witness recalled telling the prosecutor and other unnamed persons certain specific items of information. This tactic triggered the ensuing colloquy:

Q.30 As I understand it, Ricky, you told us that something when you woke up, after you had gone to bed, and that you went into the other room to where the window was. Do you remember telling us that?

A. (Nod, indicating yes.)

Q.31 Do you remember telling me, back in the back? Do you remember telling me what you saw when you looked out the window?

A. (Nod, indicating yes.)

Q.32 Did you see your dad? Do you remember telling us that you saw your dad when you looked out the window? Do you remember telling us that you saw him?

A. (No answer.)

JUDGE: Answer the question, Ricky.

Q.33 Do you remember telling us what he was doing when you saw him?

A. (No answer.)

Q.34 Do you remember telling us that you saw your dad leaving the house and going down the road?

A. (No answer.)

Q.35 Do you remember telling us that?

A. (No answer.)

Q.36 Do you remember telling us about your mother?

A. (No answer.)

Q.37 Is there any reason that you don't want to tell us out here?

A. (No answer.) (T.E., pp. 126-127).

As this excerpt from the trial transcript amply demonstrates, this eight-year-old boy seemed completely unable to comprehend or respond to the prosecutor's series of undeniably "leading" questions. Confronted with such an obviously incompetent witness, appellant's counsel again voiced an objection to the testimony, but was summarily overruled (T.E., p. 127).

Buttressed by the trial judge's ruling, the prosecutor resumed his inquiry:

Q.39 After you came in to where you could see out the window, remember telling us that?

A. (Nod, indicating yes.)

Q.40 Do you remember telling us that you saw your dad? Remember telling us that?

A. (Nod, indicating yes.)

MR. HARRINGTON:

We want to object. Show our objection.

Q.41 I notice you're still nodding your head yes; but, so they can hear you, you'll need to answer. Do you remember telling us that you saw your dad when you came out and looked out the window?

A. Yes.

Q.42. And do you remember telling us that you saw him going down the road?

A. Yes.

Q.43 Do you remember telling us that he was carrying your mother?

A. (No answer.)

Q.44 Do you remember telling us that?

A. (No answer.)

Q.45 Do you remember telling us that he was carrying your mother when you saw him going down the road?

A. (Nod, indicating yes.)

Q.46 I notice you nodded your head again. Is that true that you told us that you saw him carrying your mother?

A. (Nod, indicating yes.)

Q.47 Speak right into that so they can hear you?

A. Yes.

Q.48 Do you remember where. . .did you all have a car down the road there? Did you all have a car that was parked down there?

A. Yes.

Q.49 Where did your daddy take your mother? Could you see?

A. No.

Q.50 Do you know what kind of car it was that you all had?

A. (Nod, indicating no.)

Q.51 Did you, do you remember telling us whether or not it was a Comet?

A. (Nod, indicating yes.)

Q.52 Did your dad, when he was carrying your mother, go close to the Comet car?

A. No.

Q.53 Do you remember telling us that he went close to the Comet car and crossed the branch? Do you remember telling us that?

A. Yes.

Q.54 Do you remember telling us that you saw your dad carrying your mother across the road and into the woods?

A. Yes.

Q.55 Did you say that?

A. (Nod, indicating yes.)
(T.E., pp. 127-129).

With that nod from the witness, the prosecutor concluded his direct examination (T.E., p. 129). Appellant's counsel immediately protested the impropriety of allowing the testimony of this eight-year-old child to be considered by the jury:

> I want to enter a motion to set aside the swearing of the jury for the reason that a child eight years old is unable to answer until he'd been told what to answer, and never at any time did he answer any question on his own, all from the suggestions of the Commonwealth's Attorney and coaching as to what he ought to say before he answered and being very reluctant before he answered any questions, which shows now that any question is not his answers but answers that were put in his mouth by the suggestions of the Commonwealth's Attorney (T.E., p. 129).

This motion was also overruled by the trial court (T.E., p. 129). After briefly cross-examining the witness, appellant's counsel renewed his objections to the testimony, but was again overruled (T.E., p. 132).

This issue was brought to the trial court's attention when trial defense counsel, in the course of moving for a directed verdict, noted, inter alia, that the court should not consider any of Ricky Cantrell's testimony:

> for the reason that he was not able to by reason of mental or otherwise to answer any questions without suggestions of the Commonwealth's Attorney and refused to answer until he had been instructed three or four different times by the Attorney for the Commonwealth what he desired him to state (T.E., p. 133).

The issue in question was also an integral portion of appellant's motion for a new trial, in which defense counsel asserted in ground one (1):

> The Court erred in permitting the Commonwealth to introduce the testimony of an eight year old child, who on the witness stand, showed beyond any question that he was incapable of answering any questions from his own knowledge with reference to the offense charged except upon extensive prompting and suggestive answers by the Commonwealth Attorney and by reminding him of what he had told him in a private conversation with him out of the Court, which occurred frequently (T.R., p. 18).

That motion was, of course, overruled (T.R., p. 20).

There is no unalterable rule measuring the competency of a witness because of his age, and the court should make inquiry into the child's qualifications and determine whether he is sufficiently intelligent to observe, recollect and narrate facts, and has a sense of obligation to speak the truth. Jackson v. Commonwealth, 301 Ky. 562, 192 S.W. 2d 480, 481-482 (1946).

In the case at bar the trial judge's preliminary competency examination of Ricky Cantrell was perfunctory and insubstantial. After learning that the witness was an eight-year-old first-grader, the trial judge bombarded the child with four "leading" questions which solicited an affirmative answer (T.E., p. 122). Significantly, the trial judge did not seek an answer to each individual question, but settled for a "nod, indicating yes" (T.E., p. 122). The child was never asked to verbalize any response to the questions so that the trial judge could assess his "obligation to speak the truth."

Furthermore, the questions propounded by the trial judge, even answered affirmatively, would furnish little insight into the child's comprehension of his obligation to tell the truth. For example, the trial court asked, "You know what could happen if you don't tell the truth?" An

affirmative response to this question reveals nothing. Nevertheless, the trial judge never asked the child to explain what he thought could happen if he failed to tell the truth. Obviously, a perusal of the record establishes that the trial judge's inquiry was woefully deficient in ascertaining the child's "sense of obligation to speak the truth."

Equally significant is the fact that the trial judge in his competency inquiry asked no questions which would enable him to evaluate whether the child was "sufficiently intelligent to observe, recollect and narrate facts."

This Court, in Meade v. Commonwealth, 214 Ky. 88, 282 S.W. 781, 783 (1926), stated that the true test of the competency of a child witness is "[w]hether the witness possesses sufficient intelligence to truthfully narrate the facts to which his attention is directed and about which he may be inquired."

In the case at bar, no interrogation of Ricky Cantrell was made to determine if he had sufficient intelligence to truthfully narrate the facts about which he would be questioned. In view of the content and brevity of the competency inquiry conducted by the trial judge, it is undeniable that the trial court lacked sufficient data with which to make a rational decision on the boy's competency to testify.

In Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d 834, 837 (1937), this Court ruled that the trial judge erred in determining a six-year-old child to be a competent witness after conducting only a "brief examination of the infant witness as to his competency." The error was held to be "a palpable abuse of discretion" which "may well have been of prejudicial effect upon the substantial rights of the defendant." Id.

Even a review of the prosecutor's questioning of the child reveals that Ricky Cantrell lacked sufficient intelligence to narrate truthfully what he had supposedly witnessed. On seventeen separate occasions during direct examination, the court reporter parenthetically noted that the witness, Ricky Cantrell, made "no answer" (T.E., pp. 124, 125, 126, 127, 128).

Ricky Cantrell's competency as a witness is further undermined by the fact that he never narrated any account of his supposed observations. Instead the prosecutor asked him patently "leading" questions to which he responded with either a terse "yes" or "no" or a nod of his head (T.E., pp. 123-129). Such a method of testimony by a child witness is indicative of his incompetency as a witness. Under the procedure employed, the prosecutor related the account of the incidents and the witness gave his approval to the prosecutor's testimony.

It is well recognized that "[t]he question of a child's competency as a witness may be determined either from a preliminary examination or from his testimony before the jury, or both." Wharton's Criminal Evidence (13th Ed. 1972), Vol. II, §380. In the instant case the preliminary examination by the trial judge was so deficient that it cannot be used as an indicator of competency. Consequently, the only available barometer of Ricky Cantrell's competency is his actual testimony. Analysis of the content of that testimony establishes that the trial court lacked any factual basis for ruling, over defense objection, that Ricky Cantrell was competent to testify.

In a remarkably similar factual situation, this Court in Moore v. Commonwealth, Ky., 384 S.W.2d 498 (1964), held that the trial court committed prejudicial error by

allowing an eight-year-old child to testify without first carefully examining her to ascertain whether she was sufficiently intelligent to observe, recollect and narrate the facts and had a noral sense of obligation to speak the truth. This Court in Moore gave the following rationale for its decision:

> In the instant case the examination of the child was so superficial that no accurate appraisal of her mental capacity could be made. The questions propounded to her on voir dire examination should have elicited answers which would demonstrate her ability to observe, recollect and truthfully narrate the facts. Her subsequent testimony in chief being primarily monosyllabic responses to leading questions is of little assistance in determining her competency as a witness. Id., at 500.

Appellant submits that the decision in the Moore case is dispositive of the issue raised in this assignment of error. In both the cited case and the case at bar the witnesses were eight years old. In each case the preliminary examination of the child's competency was so superficial that no accurate evaluation of mental capacity could be made. Finally, the testimony of Ricky Cantrell, like the child witness in Moore, was "primarily monosyllabic responses to leading questions." On the precedent of Moore, this Court should hold that the trial judge in the case at bar erroneously ruled Ricky Cantrell competent to testify.

Since Ricky Cantrell's "testimony" indicates that appellant on Sunday night, December 9, 1973, was carrying his wife toward the woods near their home, the prejudicial impact of the child's testimony is manifest.

Accordingly, on the basis of this error, appellant's conviction must be reversed.

III.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING THE PROSECUTION, OVER DEFENSE OBJECTION, TO REOPEN THE COMMONWEALTH'S CASE FOR THE PURPOSE OF INTRODUCING THE TESTIMONY OF BILLY ROSE, JR.

After appellant completed his testimony on April 18, 1974, both the defense and the prosecution rested (T.E., p. 188). Appellant's counsel then renewed his motion for a directed verdict of acquittal which the trial judge promptly overruled (T.E., p. 188). Shortly thereafter the trial judge adjourned the court for the day (T.E., p. 189).

When the court reconvened at one p.m. on April 19, 1974, the prosecutor in chambers made the following request:

> Comes the Commonwealth and moves the Court for permission to re-open the evidence in chief and to present the testimony of a witness who was learned of or about subsequent to the Commonwealth's having rested and the defendant rested and it not being brought to the attention of the Commonwealth's Attorney until after the noon hour of this day. Such evidence is material, pertinent, and vital; because, it is believed that this witness will testify that he saw the body of Patsy Cantrell in the bedroom of the Cantrell home on Sunday evening, December 9, 1973. That further, he touched the body and as much as a layman, a youthful person, could, in his opinion, determined she was dead (T.E., p. 190).

The prosecutor explained that the witness in question was Billy Joe Rose, the seventeen-year-old grandson of Emma King (T.E., p. 190).

In response to an inquiry by the trial judge, the prosecutor stated that he had "no way of knowing about" the witness (T.E., p. 190). At that juncture appellant's counsel objected on the grounds that the defense "had no knowledge of" the witness and "had no way to check or make any investigation" (T.E., pp. 190-191).

The trial judge acknowledged that "it's kind of a close question and rather ticklish one," but he "sustained the motion to. . .re-open the case in chief for the Commonwealth for the purpose of introduction of one witness, Billy Joe Rose, Jr., as a material witness for the Commonwealth" (T.E., p. 192). In making this ruling, the trial judge noted that the prosecution had "confirmed" that "there was nothing that they had ever investigated to reveal this" information (T.E., p. 192).

Again the defense counsel objected, saying:

> Comes now the defendant and objected to the motion for the reason the evidence in chief for both sides had been taken and only rebuttal evidence remained, and this defendant will be unable to make any investigation or determine any way that this witness that you speak of, and it clearly will be an injustice to him to re-open the case at this time, and excepts (T.E., p. 192).

Billy Rose, Jr., then testified that Sunday night, December 9, 1973, when he entered the Cantrell home, after hearing a "bunch of screams," he found Patsy Cantrell already lying dead on the bedroom floor and appellant, with eyes downcast, seated in a nearby chair (T.E., pp. 194-198).

In his motion for a new trial, appellant reiterated his objection to the prosecution's reopening of its case, saying:

> The Court erred in allowing the Commonwealth to reopen its case after both sides had rested except for rebuttal by the Commonwealth and introduced new evidence chief of a witness, which was a complete surprise to the Defendant and whose name had not appeared in the case at any time during and before the trial, which prejudiced the rights of this Defendant and deprived him of a fair trial (T.R., p. 18).

As previously noted, that motion was overruled (T.R., p. 20).

It is ordinarily improper to permit evidence in chief after both sides have rested. Harvey v. Commonwealth, 312 Ky. 688, 229 S.W.2d 458, 460 (1950). Normally the trial court has discretion to permit evidence in chief to be introduced after both sides have rested where good cause is shown for failure seasonably to introduce the evidence. Id.

The reopening of a case for the purpose of introducing overlooked evidence must be done with extreme reluctance. 23 C.J.S. Criminal Law §1055. The rationale for this rule is that undue emphasis is attached to evidence which is belatedly introduced, with a consequent distortion of the evidence as a whole. Eason v. United States, 281 F.2d 818 (9th Cir. 1960).

This Court has previously acknowledged that the trial court's decision to allow the prosecution to reopen its case will not be reversed on appeal unless the trial court has abused its discretion. Harvey v. Commonwealth, supra, at 460.

After the prosecution has rested it should not be permitted to introduce additional evidence without a showing of some reason for its failure to produce it at the time of introducing the case in chief. In the case at bar the Commonwealth attempted to demonstrate "good cause" for the belated introduction of Billy Rose's testimony by asserting that the delay in introducing the evidence was not attributable to the prosecution.

Even when the prosecution's failure to introduce the evidence earlier is not the result of either strategic manipulations or negligence, belated introduction of the evidence may still constitute an abuse of discretion by the

trial court. The ultimate test involves the prejudicial ramifications of allowing the particular evidence to be presented to the jury after both sides have rested.

In Lucas v. Commonwealth, 302 Ky. 512, 195 S.W.2d 90 (1946), this Court discussed the ramifications of a comparable situation -- the introduction of substantive evidence as rebuttal:

> It was the most damaging evidence offered by the Commonwealth, and its introduction during the final stages of the trial was, under the circumstances, prejudicial to appellant's rights.

Prior to the reopening of the Commonwealth's case, no evidence had been introduced which established when Patsy Cantrell died or that appellant was with the deceased shortly after her demise. Consequently, Billy Rose's testimony, unfairly magnified by its position in the trial, would tend to overshadow the other evidence presented in a more normal and orderly fashion. Under the circumstances of the case sub judice, it appears probable that the introduction of Billy Rose's testimony after the defense had rested prejudiced appellant's case.

Accordingly, for the reasons delineated above, appellant's conviction must be reversed and the case remanded for a new trial.

IV.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE OF ANOTHER CRIME WHICH WAS NOT CHARGED IN THE INDICTMENT.

In his opening statement, the prosecutor stated:

> [W]e will show you by Emma King, and the discussions in her presence, the motive behind this killing (T.E., p. 10).

Emma King, a prosecution witness, testified that on Sunday, December 9, 1973, appellant told her that "somebody" had "bothered" his ten-year-old daughter, Judy, "out at the gap" (T.E., p. 90).

During that conversation, Mrs. Cantrell supposedly interjected an account of an incident which occurred while appellant and his daughter, Judy, were "on the hill fencing" (T.E., p. 91). Mrs. King offered this paraphrase of the ensuing conversation between appellant and his wife:

> Well, she said, telling about him and Judy being up on the hill fencing. So he started _____, and said Judy took the wire and run off the hill with it, and said that they's another one bothered her there. And she said, "Well, who was it, Earl?" And Earl was a drinking when he was a talking, and he said, "I don't know who it was. I didn't see nobody." She said, "There wasn't but one man up there and it was you." Now that was exactly what she said (T.E., p. 92).

Throughout this portion of Emma King's testimony, appellant's counsel objected, stating, inter alia, that this was "an attempt" to inject extraneous matter into the case (T.E., p. 91). The prosecution responded by asserting that the evidence went to establish "the motive" in the case (T.E., p. 91).

Later the prosecutor cross-examined appellant about his alleged argument with his wife at Emma King's on Sunday, December 9, 1973 (T.E., p. 171). During this examination, the following exchange occurred:

> Q.202 And, in fact, that [the argument] led to a serious discussion with your wife over who had abused your daughter, if she had been abused?
>
> A. I don't even know what your talking about.
>
> Q.203 Wasn't there any charge made that you had abused her (T.E., pp. 171-172).

At that point trial defense counsel objected and the trial court sustained the objection (T.E., p. 172). When the prosecutor continued to question appellant about the alleged sexual assault on appellant's daughter, defense counsel moved "to set aside the swearing of the jury on the basis of incompetent evidence and inflaming the jury against" appellant (T.E., p. 172).

The prosecutor returned to this line of questioning later in his cross-examination of appellant:

> Q.325 Well, didn't your wife at that time accuse you of being the one that molested her [Judy] (T.E., p. 186).

Although appellant's counsel immediately objected, the trial judge made no ruling (T.E., p. 186). Consequently, the prosecutor continued his harangue:

> Q.326 Isn't that what the anger and fight was over?
>
> A. We never had no fight.
>
> Q.327 Did you tell the officers that your wife accused you of that? Now, you're under oath (T.E., p. 186).

Again defense counsel objected, but to no avail (T.E., p. 186).

At the conclusion of appellant's testimony, appellant's counsel renewed his motion to set aside the swearing of the jury "for permitting incompetent evidence as to another crime which the defendant was supposed to have been charged with" (T.E., p. 187). This motion was summarily overruled (T.E., p. 187).

Finally, in his closing argument, the prosecutor returned to this theme and stated:

> If Earl Cantrell killed his wife there had to be a reason, and what better reason than a molesting of a small child, and the fear, as he

> himself said from the witness stand, that his wife on more than one occasion said, "I'm going to get the law," or "I'm going to bring the law." And when a man's in that position and realizes that he faces a life charge on rape, he certainly can become a desperate and dangerous man (T.E., p. 236).

The issue under consideration was the basis of two separate grounds advanced in support of appellant's motion for a new trial:

> The Court erred in permitting the Commonwealth to question their witnesses extensively with reference to a charge of rape against the Defendant then pending in the Johnson Circuit Court, charging him with the rape of his ten year old daughter which could only influence and prejudice the jury against this Defendant over the objections of the Defendant and this occurred with numerous witnesses.
>
> * * * * * * * * * * * * * *
>
> The Defendant further states that the Court erred in overruling the Defendant's Motion to set aside the swearing of the jury after the Commonwealth had gone into length as to the charge of rape against this Defendant which substantually prejudiced and deprived this Defendant of a fair and impartial trial (T.R., pp. 17-19).

In Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972), this Court announced:

> The general and well-established rule in criminal cases in this state is that evidence which in any manner shows or tends to show that a defendant has committed another offense independent of that for which he is on trial is inadmissible. Keith v. Commonwealth, Ky., 251 S.W.2d 850 (1952). Id., at 588.

Appellant was entitled to be tried for the crime charged in the indictment and no other. Pankey v. Commonwealth, Ky., 485 S.W.2d 513, 526 (1972). The reason for

this rule is apparent. As a general rule, evidence of marginally relevant prior or contemporaneous criminal conduct of an accused is not admissible in a trial of the accused because of its tendency to prejudice and inflame the jury and possibly deprive an accused of a fair trial on the substantive crime for which he is charged. United States v. Geibhart, 441 F.2d 1261 (6th Cir. 1971).

In this jurisdiction it is recognized that evidence of crimes other than the offense charged in the indictment could be competent to establish motive. Arnett v. Commonwealth, Ky., 470 S.W.2d 834, 836 (1971). While appellant concedes the validity of this exception to the general rule, appellant submits that the "motive" exception is not applicable under the facts of the instant case.

It must be remembered that the only evidence of appellant's alleged sexual intimacies with his ten-year-old daughter was Emma King's ambiguous and sketchy recollection of a brief conversation between appellant and his wife at the King household (T.E., pp. 90-92). With the evidence on the question of appellant's improper sexual activities with his daughter of such dubious probative value, the prosecution should not have been permitted to place before the jury the charge that appellant was "molesting" his own child (T.E., p. 236). Clearly the probative value of this evidence as it related to a possible motive for the alleged killing is dwarfed by the prejudicial effect of informing the jury that the accused has sexually abused his ten-year-old daughter. In Quarles v. Commonwealth, Ky., 245 S.W.2d 947 (1951), this Court stated as follows:

> It is the rule in all jurisdictions that evidence of an independent offense is inadmissible even though it may have some tendency to prove the commission of the crime charged,

> because the probative value of the evidence is greatly outweighed by its prejudicial affect. This is expecially so where the evidence is of an isolated, wholly disconnected offense.

Since the prosecution's case against appellant was extremely weak (see Assignment of Error I), the prejudicial effect of the evidence of appellant's alleged sexual abuse of his daughter cannot be overestimated.

Consequently, the evidence of appellant's alleged sexual involvement with his daughter was improperly admitted into evidence. Accordingly, the trial judge was required to grant appellant's motion and discharge the jury panel. The trial court's failure to grant the requested relief mandates reversal of appellant's conviction.

V.

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS DURING CLOSING ARGUMENT CONSTITUTED ERROR WHICH SUBSTANTIALLY PREJUDICED APPELLANT.

Near the conclusion of his closing argument, the prosecutor told the jury:

> This woman, her little boy or girl who swore said she'd never been to Sunday School or church, never been to Sunday School or church. I wonder, I wonder what Patsy Cantrell, her last, very second thoughts, before someone put her soul into eternity, not of her own will, no time to prepare for her Maker, she was suddenly thrust before the bar of judgment. And whatever you do to Earl Cantrell you can not be as cruel as he was to her; because he's going to have time to prepare himself, something that his wife never had and never can have again.
>
> Ladies and Gentlemen, I submit to you that when you start with the thread of the very beginning up to _____ and you carry it down to the point where toes of the right foot and fingers of the right hand

> were coming out of an un-natural grave, the flesh of this Mrs. Cantrell is not crying for revenge but crying for justice. And she's crying for her name to be cleared; because not one word has been said against her, that she was a bad mother or that she was a bad wife. And the only accusation made against her is made by her husband, the defendant, that she bootlegged. She didn't drive a car. She had maybe a beginner's permit somebody said. But I wonder if there was bootlegging going on, who was the bootlegger, who really was? But not satisfied with her death, lest blackening her image (T.E., pp. 242-243).

Even if the prosecutor's comments about the deceased's status before an eternal tribunal were intended only to express his own personal religious convictions, those remarks still had no place in a court of law. These comments injected extraneous issues into appellant's trial. It must be remembered that:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law. . .American Bar Association, Standards Relating to The Prosecution Function, Standard 5.8(d).

The prosecutor's diatribe was a calculated appeal to the passions and prejudices of the jury. Such an argument serves no purpose but to inflame the jury.

This type of argument is prohibited by Standard 5.8(c) of the American Bar Association's Standards Relating to The Prosecution Function, which states:

> The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

It is a prosecutor's "duty to see that no statement that is calculated to mislead the jury or stir up prejudice

in their minds is made." Bowling v. Commonwealth, Ky., 279 S.W.2d 23, 25 (1955).

It must be remembered that "[a] Commonwealth's Attorney may not so inflame the jurors with heinous details or consequences of a crime that they, solely out of passion and prejudice, will be led to return a verdict of guilty." Harness v. Commonwealth, Ky., 475 S.W.2d 485, 490 (1972).

Since the evidence of record in the case at bar was based on speculation and conjecture (see Assignment of Error I), the prosecutor's inflammatory remarks were more likely to incite the jury to convict on passion and prejudice without regard for the evidence presented.

Even though appellant's counsel did not object to the prosecutor's improper comments, this Court should still review this allegation of error since the prejudicial comments of the prosecutor resulted in "a manifest injustice." Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Additionally, the Sixth Circuit Court of Appeals in United States v. Black, 480 F.2d 504 (6th Cir. 1973), held that even where no objection is made to a prosecutor's improper closing argument, an appellate court should intercede "where the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." Id., at 507.

Where, as in the case at bar, it clearly appears that the argument has gone beyond bounds necessary to fasten guilt and has taken undue advantage of the accused, this Court has always reversed on the ground of improper argument. Webb v. Commonwealth, Ky., 451 S.W.2d 397, 398-399 (1970).

For the reasons set forth above, it is evident that the improper and inflammatory remarks delivered by the prosecutor during his closing argument substantially prejudiced

appellant and deprived him of a fair trial. Consequently, this Court should reverse appellant's conviction.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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